month old". An attempt was made to attach one of the buffaloes and the offspring of the others, to which the grantee of the bill of sale objected.

Held, that the description of the buffalo in the bill of sale satisfied Section 5(i) of the Bills of Sale Enactment (Cap. 57).

Held further, that the assurance of the animals gave to the grantee the property in their offspring born after the date of the bill.

MAGISTRATE'S CIVIL APPEAL.

Farr for the Appellant.

Thivy for the Respondent.

Cur. Ad. Vult.

MURRAY-AYNSLEY, J.—The case arises out of a bill of sale transaction. One Santa Singh the Appellant on December 5th 1934 sold certain buffaloes to one Buda. On the following day Buda gave a bill of sale over the same buffaloes to the Appellant. Now another Santa Singh, the Respondent, has attempted to attach one of the buffaloes and the offspring of others to which the Appellant objects. There seem to be two points in the case, first was the surviving buffalo adequately described in the bill of sale? Secondly what is the position of the offspring of animals subject to a bill of sale.

As regards the first point Section 5(i) of Cap. 57 requires:—

> "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale, and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule and shall be void in respect of any personal chattels not so specifically described".

This wording is based on that of the 1882 Act in England which Act was intended to protect borrowers. Here there is one act which is intended to serve the purpose of the 1882 Act and of the 1878 Act which was intended to protect creditors. This double purpose of the combined Enactment increases the difficulties of construction which were already considerable in the English Acts.

The words of description used in this case are "One Indian she buffalo calf colour black one month old." It is argued that a more accurate description could have been given, in particular the colour of the tip of the tail could have been given and according to the evidence usually is given in these cases.

But the English authorities do not support the view that any very meticulous description is required. The world "specific" is normally opposed to the word "general" and I think that the aim of the provision is to make it necessary to enumerate all the chattels intended to be passed and prevent the use of general words which on the one hand might cause the class of people who normally give bills of sale to be ignorant of what they were assigning and on the other hand might render identification difficult. Here there is a description which is specific and I think that it satisfies the terms of the section. The cases where a description has been held to be insufficient have been cases where a whole class has been described in general terms. Even in those cases it has been held that it is not necessary to describe each individual member of a class separately.

The only test is what is a reasonable description in the circumstances and I think that on this point the Appellant is entitled to succeed.

The other point I found one of some difficulty. On the one hand as the claim of the Appellant to the offspring is traced back to the bill of sale it might be considered that the terms of Section 5 (i) would have the effect of barring the claim of the Appellant. Apart from the provisions of section 5 the assurance of the animals in the bill of sale would give to the Appellant the property in the offspring born after that date. If the section applied only to mortgage bills of sale it might be reasonable to limit the rights of the grantee to the animals actually described but as the section applies equally to absolute bills of sale and in that case, I consider such a construction inapplicable.

I think that the effect is that where an assurance of a chattel is required it must satisfy the requirements of the section or the bill of sale is void as regards such chattel. This covers the ordinary case of after acquired chattels. But in this case no assurance is required to give the property to the grantee. The question of redemption gives rise to other problems which do not arise in this case. I think that on this part also the Appellant is entitled to succeed.

It is clear that a bill of sale when registered is good against execution creditors.

The appeal must therefore be allowed with costs.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

RAJA MUSA, Ag. J.

August 18, 1938

SUCHAIT SINGH son of KARAM SINGH .....Plaintiff

vs.

SHER ALI KHAN son of KESAR KHAN by his Administratrix RAHIMAH BINTI HAJI BISHARAT.....Defendant

[NEGRI SEMBILAN CIVIL SUIT No. 35 of 1937]

Land Code, S. 148—charge—absence of provision for post diem interest—claim for damage for breach of contract—conditions under which claim maintainable—interest—default in payment for more than 3 years—limitation—Limitation Enactment, S. 19, Articles 47, 95.

Section 148 of the Land Code does not preclude a chargee from instituting a suit for damages for breach of contract provided (1) the charge does not provide for *post diem* interest and (2) the suit is confined entirely to a claim for damages and costs and does not include any part of the amount due and owing under the charge.

Where it cannot be shown that a charge executed in the Federated Malay States falls under any of the special Articles in the Schedule to the Limitation Enactment, Article 95 should be applied.

Arumugam v. *Leonard*, (1936) F.M.S.L.R. 1; (1936) 7 M.L.J. 252 applied.

TRIAL OF ACTION.

Wright for the plaintiff.

Jeff for the defendant.

Cur. Ad. Vult.

RAJA MUSA, AG. J.—The facts agreed upon in this case are as follows:—

Sher Ali Khan, now deceased, and hereinafter called the Chargor, charged his land held under Entry in Mukim Register 599 in the Mukim of Ampangan, District of Seremban, in favour of Suchait Singh, the Plaintiff, on the 28th day of February 1925 to secure a loan of $3,200.

By the terms of the charge (Exhibit "A" to the plaint) the chargor bound himself to repay the principal sum of $3,200 on the 28th day of February 1926 with interest, in the meanwhile, at the rate of 15 per cent. per annum equivalent to $40 per mensem.

No provision was made for *post diem* interest.

As on the 28th February 1926 the amount due under the charge was $2,067.08 for principal and $54.10 for interest. That sum was not paid on the due date.

The chargor continued to pay interest year by year until May 1930. His next payment of interest was in February 1935, very nearly five years afterwards. There is some dispute as to the exact dates of actual payments between May 1930 and February 1935. Mr. Wright, for the Plaintiff, alleged that the lump sum payment in February 1935 was really composed of separate payments made anterior to February 1935 and was shown, for the purposes of convenience, in the account annexed to the plaint as one payment made in February 1935. Mr. Wright, however, was prepared to admit, for the purposes of the argument in this case, that the Plaintiff's account does show a break of more than three years in the payment of interest.

Thereafter the Chargor continued, once again, to pay interest year by year until May 1936 when payment ceased.

The plaintiff then applied to the Collector at Seremban for an order of sale under the Land Code, Chapter 138 and the latter made an order dated the 31st May 1937. (Exhibit "A" to the statement of defence).

On the 8th June 1937 the Plaintiff issued the plaint in this action.

The order of the Collector has not as yet been carried out to this day. In other words the land, the subject matter of the charge, has not, as yet, been sold.

Mr. Jeff, for the Chargor, who now carries on the suit by his administratrix, raises two preliminary points in defence, namely:—

(i) This action does not lie in view of the provisions of section 148 of the Land Code and

(ii) If it does lie, on the pleadings, the action is barred by Article 47 of the Limitation Enactment.

Taking the defence of section 148 of the Land Code first, Mr. Jeff's argument comes to this:—

> The land, not having been sold yet, this action is not maintainable.

The intention of the legislature, to be gathered from the section, is quite clear in that it prohibits any action whatsoever in any Court which arises from a charge in respect of land held under Entry in the Mukim Register without reccurse being had first to the Collector.

The section is wide enough to include an action such as this which is nothing more nor less than an action for interest arising from the charge although it is cloaked under the different name of damages for breach of contract.

By way of analogy Mr. Jeff cited to me an unreported case—Raub Civil Suit No. 16 of 1937. I have seen the file of that suit. There Cussen J. dismissed the claim. There is no written judgment in that suit.

I also recalled to Mr. Jeff another suit, unreported, where an action on a promissory note which had been given to a chargee for arrears of interest due under a charge over land held under Entry in the Mukim Register was dismissed because it was held that section 148 of the Land Code applied.

Mr. Wright for the Plaintiff put his case as follows:—

By section 142 of the Land Code the Collector is to determine "the amount due under the charge". In this case that has been done. In determining that amount the Collector was guided by the decision in *Arumugam* vs. *Leonard*. (1936) F.M.S.L.R. 1; (1936) 7 M.L.J. 252, and he fixed it at $2,067.08 for principal and $54.10 for interest as being due on the 28th February 1926. This action is one for damages for breach of the contract to pay on the 28th February 1926 and no part of the present claim includes the amount due under the charge as determined by the Collector.

What section 148 aims at prohibiting is an action for the recovery of "such money or any part thereof". "Such money" can only mean the money due under the charge and the claim now being for damages for breach of contract is not money due under the charge in the sense that it is secured by the charge.

Previous to the decision in *Arumugam* vs. *Leonard* (*supra*) there was never any difficulty

with regard to the construction of section 148 because it was, I believe, the universal practice to allow *post diem* interest even in charges framed in the same form as the present one. So that, in determining the amount due under section 142, interest right up to the date of sale was always allowed. This of course had the effect of giving to the chargee security under the charge for every cent that he claimed. Naturally it became unnecessary for him to bring any action on the personal covenant until after the sale of the land secured by the charge. For that reason section 148 was seldom, if ever, invoked except perhaps in cases such as the one that was based on the promissory note referred to above.

The Court of Appeal by its decision in the case of *Arumugam* vs. *Leonard* (*supra*) then settled the law and pronounced what I have called the universal practice to be irregular.

The result of the decision is that a chargee, in a case where there is no provision for *post diem* interest, is only secured to the extent of his principal and interest up to the due date, whatever sum he may obtain by way of damages for breach of contract, which by the way, is entirely in the discretion of the Court, does not fall within his security.

That being the position my view is that section 148 does not prevent a chargee from instituting a suit for damages for breach of contract provided that—

(a) the charge does not provide for *post diem* interest and

(b) his suit is confined entirely to a claim for damages and costs and does not include any part of the amount due and owing under such charge.

I hold this view for the following reasons.

There is nothing in section 148 to indicate what the term "such money" is really intended to mean. But to my mind, from the general context of Part X. of the Code under which section 148 appears, it is clear that the term relates to money *secured by the charge.*

I find support in this view from certain dicta in the Judgment of the Court of Appeal in Selangor Civil Appeal No. 21 of 1933, (unreported). (This is the appeal in the case based on the promissory note referred to earlier). Sir Samuel Thomas said:—

> "Section 148 is not very clearly expressed. It refers to 'this Chapter' although the Enactment is not divided into chapters but into parts. As to this I am satisfied that this part is intended. It refers to 'such money.' I am satisfied that this refers to the moneys included in the charge."

Sir Walter Huggard said:—

> "Although the form of section 148 leaves much to be desired I am satisfied that the section applies to the recovery of all moneys secured by a charge on land held under entry in the mukim register, including of course interest on the principal sum secured".

Finally Burton, J. said:—

> "But the effect of section 148 is that the Plaintiff cannot sue for.....the principal of the promissory note before he has exhausted the remedies under the Land Code, because that sum is interest on the charge and is part of the sum secured on the charge."

As I have said above any sum which a chargee recovers by way of damages for breach of contract is not a sum secured by the charge or due under it and does not therefore come within the term "such money" in section 148.

For these reasons I consider that the plea under this head fails and I hold that the suit is maintainable. Before leaving this matter I must endeavour to deal with the case cited by Mr. Jeff (Raub Civil Suit 16/37) and with the one that was based on the promissory note.

In Raub Civil Suit No. 16 of 1937 there are no grounds for the judgment in the file and there is nothing on the pleadings to show that section 148 was in fact pleaded. I accept, however, Mr. Jeff's statement that it was indeed raised before the learned trial Judge and that it was one of the grounds for dismissing the claim. Even so that case can be clearly distinguished from this one because, in the former, it was clearly, in effect, a claim for money due and owing under a charge over land held under entry in the mukim register which, as I have endeavoured to explain above, is clearly barred by section 148. That case therefore cannot apply to this case.

In the other case, the claim was on a promissory note which had been given for arrears of interest due under a charge over land held under entry in the mukim register and I have cited an excerpt of the judgment of Burton, J. to show why the action was not maintainable. That case therefore does not apply.

Coming now to the point of limitation Mr. Jeff argued that, if this action lay, he was clearly covered by Article 47 of the Limitation Enactment, Chapter 18 and there, admittedly, having been a break of over 3 years after 1930 in the payment of interest, the action could not be revived by subsequent payments in view of section 19 of the Enactment.

The point is already covered by authority. Terrell, J. in *Arumugam* v. *Leonard* (*supra*) said at page 14:—

> "As, therefore it cannot be shown that a Federated Malay States charge clearly falls under any of the special articles, Article 95 should be applied and the period being six years, the plea of limitation fails....."

I am bound by that decision and I accordingly hold that Article 95 applies in this case and the suit is not therefore barred.

Judgment accordingly.